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Abolition of Breach of Promise in Wisconsin - Scope and Constitutionality

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ABOLITION OF BREACH OF PROMISE IN WISCONSIN—SCOPE AND CONSTITUTIONALITY

Wisconsin has recently abolished the action for breach of promise to marry.[1] The reasons given for this legislation is that the action "does not encourage stable marriages, and . . . sanctions conduct that borders on extortion."[2] The purpose of this article is to consider the constitutional validity of this new act, and to consider to what extent traditional grounds for seeking remedies at law are included within this legislative prohibition.

I. Constitutionality of Abolishment of Common Law Action

Wilder v. Reno was the first case to express doubts concerning the constitutionality of such legislation.[3] An Illinois resident sought to enjoin the Attorney-General of Pennsylvania from applying the penalty provision of the Pennsylvania 'Heart-Balm' act. The court dismissed the petition on the grounds of insufficient evidence to show the threatened application of the penal provision. However, by way of dicta, the court stated:

> This court has serious doubt concerning the constitutionality of the entire Act in question and its penal provisions, because, first, the Act appears to take away fundamental common-law rights . . . secondly, it appears to violate the obligations of contracts and to destroy vested rights without due process of law. The penal provision is especially obnoxious because it attempts to bar resort to the courts to test the constitutionality of the Act.[4]

A. Impairment of Contract Rights

Actions for breach of promise to marry were cognizable at common law when damages, instead of fulfillment of the promises, were sought.[5] Actions for breach thereof were based on the common law action of assumpsit. Like any other contract, there was an offer, an acceptance, and consideration which was the mutuality of the two promises. Wisconsin has always recognized that an action for breach of promise to marry is an action on contract, for which the law will

[1] Chap. 595, Laws of 1959 (Effective date, Jan. 1, 1960):
248.01 "All causes of action for breach of contract to marry are hereby abolished, except that this section shall not apply to contracts now existng or to causes of action which heretofore accrued."
248.02 "No act hereafter done within this state shall operate to give rise, either within or without this state, to any of the causes of action abolished by this chapter. No contract to marry, which shall hereafter be made in this state, shall operate to give rise, either within or without this state, to any cause of action for breach thereof, and any such acts and contracts are hereby rendered ineffective to support or give rise to any such causes of action, within or without this state."

[2] V, General Report, Wisconsin Legislative Council, 1959, Bill No. 151A, at 70.

[3] 43 F. Supp. 727 (D.C. Pa. 1942).

[4] *Id.* at 728.

[5] Holcroft v. Dickenson, 124 Eng. Rep. 933 (1672).

give a remedy.[6] When this right to bring an action on contract is taken away by the legislature, the question naturally arises whether the act is an impairment of contract rights as prohibited by both the federal and Wisconsin constitutions?[7]

The leading case upholding the right of the legislature to abolish breach of promise actions is *Fearon v. Treanor*.[8] In an action for breach of promise, the New York Court of Appeals pointed out the power of the legislature to regulate and control the marriage institution. However, it is important to note that it was not denied that the abolition of breach of promise actions impaired the obligation of contracts.

> *Legislation which impairs the obligation of a contract* or otherwise deprives a person of his property can be sustained only when enacted for the promotion of the general good of the public, the protection of the lives, health, morals, comfort and general welfare of the people and when the means adopted to secure that end are reasonable.[9] [Emphasis Added].

The court then justified its decision on the broad grounds that the legislature had plenary power when dealing with the subject of marriage as an exercise of the state's police power for the protection of the public welfare.[10]

The following year, in *Hanfgarn v. Mark*, the same court upheld the right of the legislature to abolish actions for alienation of affections and criminal conversation.[11] The justification for this decision was that the abolition of these two actions did *not impair contract obligations*. The court pointed out that the marriage contract itself had long been considered an institution rather than an ordinary contract within the meaning of the constitutional prohibition. Since the marriage contract was not within the constitutional prohibition, rights which grow out of the marriage contract also were not within its scope.[12]

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[6] Dauphin v. Landrigan, 187 Wis. 633, 205 N.W. 557 (1925).

[7] U.S. Const. art. I, §10: "No state . . . shall pass any . . . law impairing the obligation of contracts. . ." Wis. Const. art. I, §12: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, . . ."

[8] 272 N.Y. 268, 5 N.E. 2d 815 (1936); rehearing denied 273 N.Y. 528, 7 N.E. 2d 677 (1937); appeal dismissed 301 U.S. 667 (1937); rehearing denied 302 U.S. 744 (1937).

[9] People v. Title & Mortgage Guarantee Co., 264 N.Y. 69, 190 N.E. 153, 157 (1934); quoted in Fearon v. Treanor, *Id.* at 817.

[10] Fearon v. Treanor, *supra* note 8, at 817:"The Legislature acting within its authority, has determined as a matter of public policy that marriages should not be entered into because of the threat or danger of an action to recover money damages and the embarrassment and humiliation growing out of such an action."

[11] 274 N.Y. 22, 8N.E. 2d 47 (1937); remittitur amended 274 N.Y. 570, 10 N.E. 2d 556 (1937); appeal dismissed 302 U.S. 641 (1937).

[12] "Not being a common law contract ,the [marriage] relation may be regulated, controlled, and modified and rights growing out of the relationship may be

Therefore, in *Fearon v. Treanor,* New York implied that the abolition of breach of promise actions was an impairment, while in *Hafgarn v. Mark,* the abolition of actions for alienation and criminal conversation was not. The reason for this difference was recognized by the court in the *Hafgarn* case: "An action to recover damages for breach of promise to marry is based upon an agreement preliminary to marriage and an action to recover damages for alienation of affections and criminal conversation is founded upon thhe marriage relationship itself."[13] Consequently, since promises to marry and its subsequent breach does not result in a marriage contract or relationship, that contract and its breach never rises above the ordinary contract to the status of an institution. Conversely, alienation of affections and criminal conversation, presuppose a marriage contract, and rights thereof grow out of the marriage institution rather than out of an ordinary contract within the constitutional prohibition .

The basis for this distinction is even more clear when compared with *Maynard v. Hill,* the leading case in which the United States Supreme Court held that the marriage contract was outside the scope of the constitutional prohibition.

> It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.[14]

Though the promise *of* marriage may not be changed by the mutual consent of the parties, the promise *to* marry before it is "executed" may be "modified, restricted, or enlarged, or entirely released upon the consent of the parties."

This basic distinction in the nature of the various Heart Balm actions has been overlooked in other jurisdictions. Since most legislative acts encompass alienation of affections, criminal conversation, seduction, and breach of promise in one act, courts have frequently passed on the constitutionality of the entire statute when considering

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modified or abolished by the Legislature without violating the provisions of the Federal and State Constitutions which forbid the taking of life, liberty, or property without due process of law." *Id.* at 48.

[13] *Id.* at 47. See also Young v. Young, 236 Ala. 627, 184 So. 187, 190 (1938): "Actions for alienation of affections and criminal conversation are both based on the marriage relation—being actions for the loss of consortium between the spouses from the wrongful acts of others."

[14] 125 U.S. 190, 210-211 (1888).

only one of the four actions.[15] Other courts have applied the reasoning from alienation of affections cases to breach of promise actions, concluding that the abolishment of breach of promise actions was constitutional since the promise to marry is not an ordinary contract and consequently not within the protection of the constitution, citing *Maynard v. Hill* and *Hanfgarn v. Mark*.[16]

B. JUSTIFICATION—THE EXERCISE OF POLICE POWER

Although *Fearon v. Treanor* held that the New York Heart Balm act impaired the obligation of contracts, it was justified on the grounds that the police power of the state could regulate the marriage relationship and agreements preliminary to it.[17] This received full expression in a New Jersey case:

> The police power, as has so often been said, is an attribute of sovereignity and is inherent in every state. The power escapes exact definition, yet all rights and property are subject to it. Whatever is harmful to the public welfare may be restrained or prohibited, for the police power extends to the protection of the public peace, good order and morals.
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> The legislature made an extended declaration of public policy in the preamble of the 'Heart Balm' Act. The purpose of the legislation was stated to be the prevention of fraud, extortion, oppression and abuse of process. Such ends fall within the ambit of the police power of the State, so that legislation which will secure or tend to secure the public against the consequences of fraud, extortion, oppression and abuse of power is constitutional.[18]

Pennington v. Stewart,[19] reiterated the right of the legislature to regulate marriage and actions relative to the marriage relationship as a valid legislative purpose enacted for the benefit of the general public. Being a valid area in which the legislature could act, the enactment of the Heart Balm act was a declaration of public policy that the legislative purpose could only be accomplished successfully by the elimination of the action entirely.[20] Consequently, since there was a valid legislative purpose, and since there was a reasonable connection between the enactment and the purpose to be accomplished, the legislature could "validly abolish a common law right or remedy, prospectively, without furnishing an adequate substitute."[21]

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[15] Bunten v. Bunten, 15 N.J. Mis. R. 532, 192 Atl. 727 (1937), upholding the constitutionality of the entire act when passing on the merits of an action for alienation of affections.

[16] Langdon v. Sayre, 74 Cal. App. 2d 41, 168 P. 2d 57 (1946); Rotwein v. Gersten, 160 Fla. 736, 36 So. 2d 419 (1948).

[17] *Supra*, note 8.

[18] Magierowski v. Buckley, 39 N.J. Super. 534, 121 A. 2d 749, 763 (1956).

[19] 212 Ind. 553, 10 N.E. 2d 619 (1937).

[20] Chiyoko Ikuta v. Shunji K. Ikuta, 97 Cal. App. 2d 787, 218 P. 2d 854 (1954).

[21] Magierowski v. Buckley, *supra*, note 18, at 761.

Wisconsin has long recognized the power of the legislature to regulate the marriage relationship. In passing on the constitutionality of the eugenics law, the Wisconsin Supreme Court declared in *Peterson v. Widule:*

> The power of the state to control and regulate by reasonable laws the marriage relation, and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases, which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must on principle be regarded as undeniable.[22]

This power of the legislature was again recognized in *Kitzman v. Kitzman,* where the court upheld the denial to an epileptic of the right to marry.[23]

Further, the exercise of the police power of the state has been specifically recognized in Wisconsin as justifying the abolition of a common law right.[24] The Wisconsin Constitution itself provides for the alteration of the common law by legislative enactments.[25] In deciding this question, the Wisconsin Supreme Court declared:

> In this state, both by the constitution and judicial decision, it is settled that those parts of the common law which were in force at the time of the adoption of the constitution and were not inconsistent therewith remained in force until changed by the legislature. . . . Where private property rights were founded upon and preserved by any part of the common law so in force, they could not be taken away or impaired by mere legislative enactment, but only for public purposes by the exercise of eminent domain, or by the *exercise of the police power for the protection of the public.*[26] [Emphasis Added].

It is a well established principle of Wisconsin constitutional law, however, that the broad police power of the state will not justify a violation of an expressed limitation of the constitution, but rather, the police power must be exercised in subordination to it.[27] Therefore, although the Wisconsin Supreme Court has recognized the right of the legislature to regulate the marriage institution and its incidences; and has also recognized the validity of the police power in altering common law rights; the essential question is whether the Supreme Court will

[22] 157 Wis. 641, 647, 147 N.W. 966, 968 (1914).
[23] 167 Wis. 308, 166 N.W. 789 (1918).
[24] Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903).
[25] Wis. Const. art. 14, §13: "Such parts of the common law as are now in force in the Territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."
[26] Huber v. Merkel, *supra,* note 24, at 364-365.
[27] "An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation but for such prohibition." State *ex rel* Jones v. Froehlich, 115 Wis. 32, 42, 91 N.W. 115, 118 (1902). See also State *ex rel* Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N.W. 500 (1906).

uphold the exercise of the police power when the right which is abolished is a common law right to a *remedy at law for a previously recognized wrong?*

C. RIGHT TO REMEDY AT LAW FOR INJURY TO PERSON, PROPERTY, OR CHARACTER

Article I, section 9, of the Wisconsin Constitution provides: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; . . . conformably to the laws."[28] It is significant to note that New York, New Jersey, and California, which uphold the constitutionailty of their acts upon the broad exercise of the police power of the state, do not have comparable provisions in their state constitutions. Two states that have this constitutional provision and have enacted Heart Balm acts are Illinois and Indiana.[29]

The Illinois Heart Balm act is distinguishable from all others in that it did not abolish the cause of action, but simply made it unlawful to file the action.[30] In *Dailey v. Parker,* the federal district court held that the law making it unlawful to file an action for alienation of affections and criminal conversation was unconstitutional.[31] After noting that the Illinois legislature had not followed the general practice of abolishing the action itself, it concluded:

> The marriage contract has always been considered in our law one of the most important contracts, and to deny any one aggrieved the right to sue for breach thereof, and to make it unlawful even to assert such a right, seems clearly to contravene the Constitution of this State, which secures to all a remedy for every wrong.[32]

The following year the Illinois Supreme Court declared the Act unconstitutional in *Heck v. Schupp,* where it was again declared that civil rights arising out of contracts could not be abolished by legislative enactment.[33]

The major criticism of the Illinois Act was that it failed to eliminate the cause of action, but rather left it without any satisfaction.[34] It is difficult to see how the abolishment of the cause of action would have permitted the act to shed its unconstitutional qualities. Since no

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[28] Wis. Const. art. I, §9: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial promptly and without delay, conformably to the laws."
[29] Ill. Const. art. 2, §19; Ind. Const. art. I, §12.
[30] Ill. Rev. Stat. 1943, chap. 38, ¶246.
[31] 61 F. Supp. 701 (D.C. Ill. 1945).
[32] *Id.* at 703.
[33] 394 Ill. 296, 68 N.E. 2d 464 (1946).
[34] Rotwein v. Gersten, *supra,* note 16.

statute forbids entering into a contract to marry, the *right to seek a remedy at law* for its wrongful breach is violated when either it is unlawful to file an action, or when the right of action is removed entirely. In either case, the "injury or wrong" resulting from the wrongful breach of a lawful contract is left without legal satisfaction.[35]

In Corpus Juris Secundum it is stated that although this type of constitutional provision is not considered as preventing legislatures from modifying the common law, courts are divided on the question whether it prohibits the legislature from abolishing entirely a common law action for injuries to person or property.[36] Those courts upholding the power of the legislature have interpreted this constitutional provision as a limitation applicable to the judicial branch only. Included in this category is Indiana, so that its Heart Balm act could be upheld *Pennington v. Stewart.*[37] This interpretation has been rejected in Wisconsin, where article I, section 9, has long been held to apply with equal force to the legislative branch.

> The result of the cases seems to be that the legislature may alter or vary existing remedies as it pleases, provided that in so doing their nature and extent is not so changed as *materially* to impair the rights and interests of creditors.[38]

In addition, this constitutional provision has been interpreted as protecting remedies which are founded upon the common law.[39] It was in the light of this interpretation that the Supreme Court held the abolition of the right to sue a county government for the negligent acts of its agents was constitutional, since the original right to sue a county government was not recognized at common law, but on the contrary, was the creation of a right by a prior legislative act which could be revoked.[40] The justification for this decision was the conclusion that the words "injuries or wrongs" of article I, section 9, had reference only to remedies which existed under the common law.[41]

Therefore, an examination of the Wisconsin interpretation of arti-

[35] "Whatever belongs merely to the remedy, may be altered according to the will of the state, provided the alteration does not impair the obligation of contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution." Von Baumbach v. Bade, 9 Wis. 559, 578 (1859). See also State *ex rel* Wickham v. Nygaard, 159 Wis. 396, 150 N.W. 513 (1915).

[36] 16 C.J.S. *Const. Law* §709(e) (1937).

[37] *Supra,* note 19.

[38] Von Baumbach v. Bade, *supra,* note 35, at 579.

[39] McCoy v. Kenosha County, 195 Wis. 273, 277, 218 N.W. 348, 350-351 (1928) where in discussing phrase 'conformably to the laws' the court stated: "That phrase, like the one 'due process of law,' must mean, as the latter phrase has repeatedly been held to mean, to relate to a recognized, long established, system of laws existing in the several states adopting the constitution as well as in the prior organizations from which the states were organized."

[40] Firemen's Ins. Co. v. Washburn County, 2 Wis. 2d 214, 85 N.W. 2d 840 (1957).

[41] *Id.* at 224, 85 N.W. 2d at 845, citing McCoy v. Kenosha County, *supra,* note 39.

cle I, section 9, discloses that it limits the extent to which a legislative enactment can remove the right to seek a remedy at law for an injury or wrong recognized at common law. *Von Baumbach v. Bade* declares the test of the constitutionality of this legislation to be: If the legislative act materially impairs the remedy, the act is unconstitutional; but if the legislative act *leaves the parties with a "substantial remedy,"* it does not violate the constitution.[42] Consequently, for the Wisconsin legislature to validly abolish the common law breach of promise action, as a valid exercise of the state's police power, it is essential that Wisconsin faced with a state constitutional provision unlike any found in New York, New Jersey, or California, must leave a *substantial remedy* available to the injured party.

II. Remedies Available to Parties Injured by a Breach of Promise

Remedies left available to injured parties, not abolished by chapter 248 of the new Wisconsin Family Code are: (A) Actions to recover gifts made in contemplation of marriage after the engagement has been broken. (B) Actions for damages for seduction when consent to the intercourse is obtained by a fraudulent promise of marriage. (C) Actions for deceit to recover financial losses incurred in reliance on a fraudulent promise of marriage. (D) Actions to recover for severe mental disturbance caused by an outrageous breach of the promise to marry.

A. Recovery of Gifts Made in Contemplation of Marriage

Jurisdictions rely on four legal theories to permit recovery of gifts or their value, given during the engagement period. Such gifts are usually rings, heirlooms, furniture, and money to establish a common household.

The most common basis used for recovery is that of conditional gifts. The gift is viewed as passing on the condition that it will be returned if the donee breaks the engagement, or the betrothal is mutually dissolved.[43] Whether the gift is conditional is ordinarily a question of intention, determined by express declarations of the donor, or most usually from circumstances surrounding the transaction.[44] At the time of making the gift parties are seldom conscious of imposing conditions upon it, but courts imply conditions liberally to achieve what invariably are desirable results.

> A second basis for allowing recovery is the doctrine of restitution. If there is an engagement to marry and the donee, having received the gift without fraud, later wrongfully breaks the

[42] *Supra,* note 35, at 578-580.
[43] 8 Am. Jur., *Breach of Promise of Marriage,* §20 (1937).
[44] *Id* §19.

> promise of marriage, the donor is entitled to restitution if the gift is an engagement ring, a family heirloom, or other similar thing intimately connected with the marriage, but not if the gift is one of money intended to be used by the donee before the marriage.[45]

This section further provides that the donor is entitled to recover his money if it has been obtained by fraud. This theory is similar to the conditional gift theory, where courts liberally imply conditions to prevent unjust enrichment.

A third basis for recovery is statutory. A California statute[46] allows recovery of the gift when the donee refuses to enter into the marriage, or the engagement is dissolved by mutual consent. A Louisiana statute[47] has been construed to allow recovery of all gifts given in contemplation of a marriage which does not take place, regardless of who is at fault in terminating the engagement.[48]

The fourth basis for granting recovery is deceit.[49] This is the most difficult theory on which to base a recovery, because an intent not to perform the promise to marry at the time it was made must be proven.[50] The mere breach is not enough to establish the fraudulent intent, but the intent must be inferred from other circumstances.[51] This theory gives no protection to the victim of a non-fraudulent promise.

I. The general effect of "Heart-Balm" acts on gift recovery actions.

Generally statutes abolishing actions for breach of promise to marry have been construed not to abolish actions for the return of engagement gifts. A different result was reached in the case of *Andie v. Kaplan*,[52] where plaintiff brought an action to recover money and jewelry delivered by him to defendant, in connection with a mutual promise to marry. Although plaintiff alleged fraud in his complaint, and that the money had been delivered in trust, the complaint was

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[45] RESTATEMENT, RESTITUTION, §58, comment c (1937).

[46] Cal. Civ. Code §1590 (Deering 1959). "When either party to a contemplated marriage in this state make a gift of money or property to the other on the basis or assumption that the marriage will take place in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just."

[47] La. Rev. Civ. Code, art. 1740 (1940). "Every donation made in favor of marriage falls, if the marriage does not take place."

[48] Wardlaw v. Conrad, 18 La. App. 387, 137 So. 603 (1931).

[49] Mack v. White, 97 Cal. App. 2d 497, 218 P. 2d 76 (1950).

[50] Hill v. Thomas, 140 S.W. 2d 875 (Tex. Civ. App. 1940).

[51] PROSSER, TORTS, §90 (2d ed. 1955). Among the circumstances listed which may be enough to establish the fraudulent intent are: circumstances which show the promisor knew at the time of making the promise that he could not perform it; his repudiation of the promise soon after it is made with no intervening change in the situation; his failure even to attempt a performance; or his continued assurances after it is clear that he will not do so.

[52] 263 App. Div. 884, 32 N.Y.S. 2d 429, *aff'd mem.* 288 N.Y. 685, 43 N.E. 2d 82 (1942).

dismissed on the ground that the cause of action stated was based on a breach of promise to marry, and therefore prohibited by the New York Civil Practice Act.[53] However, the dissent in the Appellate Division opinion highlighted the reasoning subsequently used by other jurisdictions in allowing such recoveries.

> The claim for the value of the jewelry arises out of the breach of promise to marry, but it does not come within the spirit of the statute. To deny recovery would be to justify an unjust enrichment of a wrongdoer. The purpose of the new legislation was to prevent a recovery for alleged pecuniary loss, blighted affections, wounded pride, humiliation, and the like, against the one who violated the promise, but not to enable the later to receive benefits out of his willful act.[54]

The majority position was re-affirmed in a subsequent memorandum decision of the Court of Appeals on facts similar to the *Andie* case.[55]

These decisions have produced unfair results. In *Reinhardt v. Schuster*,[56] defendant received a ring from plaintiff to take home to show her parents preparatory to the announcement of their engagement. Subsequently defendant became reluctant to return to Texas where plaintiff was established and insisted that plaintiff come to Brookyln, marry her there, and attempt to establish himself there so that she could be near her parents. On plaintiff's refusal, defendant broke the engagement. Although title to the ring had never passed to defendant, it was held that plaintiff's action was essentially based on a promise of marriage, and therefore the action was not maintainable.

In *Nosonowitz v. Kahn*,[57] defendant broke an engagement to marry and returned the ring to plaintiff. Later, on the same day, plaintiff asked defendant to reconsider her decision, and re-delivered the ring to her, expressly conditional upon her promise to return it if she decided not to become re-engaged. Defendant decided not to become re-engaged to plaintiff, but refused to return his ring. Even though plaintiff intended to vest title in defendant only if she would promise to marry him the court viewed this as an action arising out of a breach of contract to marry, falling within the bar of the act.

This New York position has been criticised.[58] In *Grishen v. Domogalski*,[59] although recovery was denied, the court expressed disapproval with this state of the law.

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[53] N.Y. Civ. Prac. Act §61-a, 61-b, and 61-d.
[54] 32 N.Y.S. 2d 429, 430 (1942).
[55] Josephson v. Dry Dock Savings Institution, 266 App. Div. 992, 45 N.Y.S. 2d 120, *aff'd mem.* 292 N.Y. 666, 56 N.E. 2d 96 (1944).
[56] 81 N.Y.S. 2d 570 (App. Div. 1948).
[57] 106 N.Y.S. 2d 836 (Munic. Ct. City of N.Y. 1951).
[58] 13 Brooklyn L. Rev. 174 (1947); 3 Wyo. L. J. 147 (1949); 3 Vill. L. Rev. (1958); 1947 Annual Survey of the American Law 845; N.Y. Law Revision Commission, Report, Recommendation, and Studies (1947), p.p. 223-247.
[59] 191 Misc. 365, 80 N.Y.S. 2d 484 (N.Y. City Ct. 1948).

> It does not seem just or logical that engaged couples who pool their resources for the purpose of buying or furnishing a home, or to meet the expenses of the marriage, should have no recourse in the event a mutual termination of the engagement results in a refusal to redivide the money or property so involved. This is wholly different from the evil of prospective damages by way of 'heart balm' for breach of promise of marriage which the Legislature sought to forever ban by the enactment of the legislation in question.

In 1947 both houses of the New York Legislature passed a bill repealing this interpretation of the Heart Balm act.[60] This bill was vetoed by the governor without a veto message.

Other jurisdictions have held that statutes abolishing actions for breach of promise to marry do not abolish actions for the recovery of engagement gifts. California allowed recovery in *Norman v. Burks*[61] without mentioning §1590 of their Civil Code which specifically allows such recoveries.[62] In *Beberman v. Segal*,[63] New Jersey allowed recovery by distinguishing recovery of a conditional gift from damages for a breach of contract to marry. New Hampshire permitted plaintiff to recover on the theory of restitution.

> It was not the intention of the New Hampshire Legislature in outlawing breach of promise suits to permit the unjust enrichment of persons to whom property had been transferred while the parties enjoyed a confidential relationship. To so construe the statute would be to permit the unjust enrichment which the statute is designed to prevent.[64]

Massachusetts, despite the earlier decision of *Thibault v. Lalumiere*[65] which leaned toward the New York view, recently allowed recovery in the case of *De Cicco v. Barker*.[66] In *Pavlic v. Vogtsberger*,[67] Pennsylvania allowed an 80 year old man to recover money

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[60] 1947 Legis. Doc. No. 65 (j). "(61j) This article shall not be deemed to prevent a court in a proper case from granting restitution of property or money transferred in contemplation of the performance of an agreement to marry which is not performed."

[61] 93 Cal. App. 2d 687, 209 P. 2d 815 (1949).

[62] *Supra*, note 46.

[63] 6 N.J. Super. 472, 69 A. 2d 587 (1949).

[64] 96 N.H. 177, 71 A. 2d 785 (1950).

[65] 31 Mass. 72, 60 N.E. 2d 349 (1945).

[66] —Mass.—, 159 N.E. 2d 534 (1959).

[67] 390 Pa. 502, 136 A. 2d 127 (1957). "It (the Heart Balm act) in no way alters the law of conditional gifts. A gift given by a man to a woman on condition that she embark on the sea of matrimony with him is no different from a gift based on the condition that the donee sail on any other sea. If, after receiving the provisional gift, the donee refuses to leave the harbor,—if the anchor of contractual performance sticks in the sands of irresolution and procrastination—the gift must be restored to the donor. . . .

"The appellant in her argument before this court would want to make of the Act of June 22, 1935, a device to perpetuate one of the very vices the Act was designed to prevent. The Act was passed to avert the perpetration of fraud by adventurers and adventuresses in the realm of heartland. To allow

and other gifts from his 26 year old girl friend who had fraudulently led him on by her promises of marriage.

2. The effect of Chapter 248 on gift actions in Wisconsin.

In view of the criticism of the New Yorw rule, and the well reasoned, more recent cases in other jurisdictions allowing the donor to recover gifts despite Heart Balm acts, it is doubted that Wisconsin would construe 248.01[68] as abolishing these actions. Wisconsin construes statutes in derogation of the common law strictly,[69] and strictly construed the statute would not bar gift actions. The Wisconsin statute is taken almost verbatim from the Pennsylvania statute abolishing breach of promise actions and Pennsylvania has held that their statute does not abolish action for the recovery of engagement gifts.[70]

However, Section 248.06[71] creates a doubt as to this otherwise probable construction of the Heart-Balm act allowing recovery of gifts. The statute expressly allows recovery of property obtained by fraudulent promises of marriage. It could be argued that the Legislature intended 248.01 to abolish actions for the recovery of gifts, as well as actions for breach of promise in all instances except that enumerated in 248.06, when the gift was obtained by fraud. It could also be argued that the Legislature intended to permit only recovery of the gift, rather than damages for deceit or conversion of the article.

Section 248.06 should not have this effect. That statute is phrased in negative terms, it provides that "Actions for the recovery of property . . . procured by . . . fraud . . . are not barred." Common law rules are not to be changed by doubtful implication.[72] It appears that

Sara Jane to retain the money and property which she got from George by dangling before him the grapes of matrimony which she never intended to let him pluck would be to place a premium on trickery, cunning, and duplicitous dealing. It would be to make a mockery of the law enacted by the Legislature in that very field of happy and unhappy hunting. . . .

"Thus the law of 1935 prohibited, but prohibited only the suing for damages based on contused feelings, sentimental bruises, wounded pride, untoward embarrassment, social humiliation, and all types of mental and emotional suffering presumably arising from a broken marital promise. The Act does not in any way ban actions resulting from a tangible loss due to the breach of a legal contract."

[68] *Supra,* note 1.

[69] Laridaen v. Railway Express Agency, 259 Wis. 178, 47 N.W .2d 727 (1951).

[70] 48 P.S. §171 (Purdon 1959). "Actions for breach of promise to marry abolished. All causes of action for breach of contract to marry are hereby abolished: Provided, however, That this section shall not apply to contracts now existing or to causes of action which heretofore accrued."

[71] Wis. Stat. §248.06 (1959). "Actions for the recovery of property received by one party from the other after the alleged contract to marry and before the breach thereof, which was procured by such party by his or her fraud in representing to the other that he or she intended to marry the other and not to breach the contract to marry, are not barred by this chapter; but such actions must be commenced within one year after the breach of the contract to marry and the cause must be shown by affirmative proof aside from the testimony of the party seeking recovery."

[72] Leach v. Leach, 261 Wis. 350, 52 N.W. 2d 896 (1952).

this statute is merely declaratory of the common law and is not intended to provide an exclusive remedy.

Further, abolishing actions to recover gifts would not better effectuate the purpose of Chapter 248.[73] This chapter was designed to prevent extortionary law suits, and to abolish encouragement to marry which the law may previously have given to parties of an unhappy betrothal.[74] There is little scandal which could furnish material for extortion involved in a property action. Once the engagement is broken, it is difficult to see how the return of gifts would encourage parties to enter an undesirable marriage.

Other states have not distinguished recovery of the gift from recovery of its monetary value in allowing or denying the donor's suit. If the donor were limited to recover only the gift itself, he might be denied a remedy if the article had been damaged, or was no longer in defendant's possession. If the gift is retained after the donor demands its return, he should be allowed damages for its conversion. If the gift were obtained by defendant's fraudulent promise of marriage, plantiff should recover damages for deceit.

It is doubtful construction to imply a legislative purpose to allow an unjust enrichment, merely because fraud cannot be proven. The non-defrauded suitor would be totally denied a remedy, even though his cause is invariably equitable. Even the defrauded suitor would have difficulty in establishing his case. Intent not to perform the promise at the time it was made is difficult to prove.[75] When the disadvantage is added of requiring him to show his cause by affirmative proof aside from his own testimony, the burden in many cases would be insurmountable. In a confidential relationship such as a marriage engagement, evidence of circumstances showing fraudulent intent at the time of the promise would normally be available only by the testimony of the party seeking recovery. Thus 248.06 provides relief only in the most extreme cases of injustice, and is not adequate, by itself, to do complete justice in pre-marital gift cases.

B. Recovery for Seduction Induced by a Fraudulent Promise of Marriage.

Under certain circumstances a woman may recover for her own seduction, as she formerly could as an aggravating circumstance in a breach of promise suit, despite the Heart-Balm act. At common law a

[73] Wis. Stat. §248.08 (1959). "This chapter shall be liberally construed to effectuate the object thereof."

[74] V, General Report, Wisconsin Legislative Council, 1959, p. 73, Bill No. 151 A, p. 67. "The action for breach of promise encourages marriages that should not take place and its abolishment is in keeping with the philosophy that legislation should be designed to promote the stability in marriage. As a remedy which permits monetary recory (sic) the action sanctions conduct that borders on extortion."

[75] *Supra,* note 51.

woman could not recover for her own seduction in an independent action, although she could recover for it indirectly as an element of damages in a breach of promise suit.[76] The woman herself was barred from recovery because she had consented to the tort committed upon her.[77] There are five exceptions to this rule. 1. In some jurisdictions the woman is given a statutory right to sue for her own seduction, despite her consent.[78] Wisconsin has no such statute and has never allowed the woman herself to recover in the common law action for seduction. 2. Under criminal statutes, such as 944.10,[79] fixing the age of consent for the crime of rape, the consent of an under-age girl is not a defense to the battery committed upon her, and she can personally recover for the battery, in a civil action, because the statute was intended to protect a limited class of individuals from their own lack of judgment.[80] 3. Consent to intercourse might not be a defense in a civil action for battery because non-marital intercourse is a crime.

> Consent by one person to allow another person to perform an unlawful act upon such person does not constitute a defense to an action to recover the actual damages which such person thereby received.[81]

To recover under this theory, however, plaintiff apparently must suffer some actual physical injury beyond the mere indignity from the contact itself.[82] 4. A woman can recover against a person who has induced her to have illicit sexual relations by fraudulent representations. The fraud vitiates the consent. This theory has two aspects. The authorities agree that if the nature of the act has been misrepresented, consent to a battery is vitiated, and plaintiff can recover for the mere contact.[83] However, when the fraud is in the inducement, collateral to the nature of the act, recovery may be had only when actual bodily harm results.[84] It could be argued that the act of non-marital intercourse

[76] 47 Am. Jur., *Seduction*, §80 (1937).
[77] PROSSER, TORTS, §18 (2d ed. 1955).
[78] *See* 4 Vernier, American Family Laws, 267 (1936).
[79] Wis. Stat. §944.10 (1959).
[80] PROSSER, TORTS, §18 (2d ed. 1955).
[81] Miller v. Bayer, 94 Wis. 123, 127, 68 N.W. 869 (1896). But see Colcin v. Milburn, 176 F. Supp. 946 (D.C. N.J. 1959). "Of course the express provision of Section 7 of the New Jersey Heart Balm act . . . prevents the application of the principle that a criminal prohibition often implies a civil remedy in the person injured by one criminal act. N.J.S.A. 2A: 23-7 provides, "Nothing contained in this chapter [the Heart Balm act] shall be construed as a repeal of any of the provisions of the penal law or the criminal procedure law or of any other law of the state relating to criminal or quasi-criminal actions or proceedings."
[82] 4 Am. Jur. *Assault and Battery*, §83 (1937).
[83] PROSSER, TORTS, §18 (2d ed. 1955); 1 Harper & James, Torts, §3.10 (1956); RESTATEMENT, TORTS, §57, comment b (1934).
[84] RESTATEMENT, TORTS, §57, comment b (1934). "An interest in freedom from bodily harm is protected from any form of conduct which is intended or likely to cause it. Therefore, while the fraudulently procured assent protects the actor from liability predicated upon the mere fact that the contact has

when the parties are engaged is substantially different than the act between non-engaged persons.[85] A fraudulent promise of marriage would thus go to the nature of the act itself. If this could not be established, the fraudulent promise would be collateral and plaintiff could recover only for her actual injuries. 5. Plaintiff might be able to recover for her personal injury in an action for deceit. Although the tort action for deceit is normally used to recover economic damages,[86] it has been used to recover for personal injuries.[87] Wisconsin has never limited the action for deceit to economic losses. It would seem superfluous, however, to base a recovery for seduction on deceit, if the misrepresentation involved vitiates the consent to the battery.

A statute abolishing actions for breach of promise to marry should have no effect on the common law action for seduction, or the first three exceptions to the consent rule. A promise to marry is not an operative fact in these recoveries. Wisconsin has no statute allowing recovery under the first exception, and there are obvious policy reasons for forbidding recovery for illegal intercourse under the third theory.[88] Therefore an adult plaintiff in Wisconsin would have to rely on the fourth and fifth exceptions to the consent rule to recover for her own seduction. When consent to illicit sexual relations is induced by a fraudulent promise of marriage, recovery should not be barred by the breach of promise statute.

Only one case has faced this question directly. In *Thibault v. Lalumiere*,[89] plaintiff attempted to recover damages for caresses to which her consent had been induced by defendant's fraudulent promises of marriage. The court held that the action was an attempt to circumvent the Heart Balm act, and denied recovery.

> If, as she now contends, her consent was procured by fraud of the defendant in that he did not intend to perform his promise to marry her, she could not maintain an action on account of such acts committed during a courtship where the only ground for contending that such acts constituted a wrong was his intent not to carry out his promise to marry her and so was directly attributable to the breach of contract to marry if, as will appear, a statute declares that the breach of such a contract shall not be deemed to be a legal wrong or injury. . . .
>
> The plaintiff's cause of action arises out of a breach of

been inflicted, he is still subject to liability for any bodily harm which results from the contact to which he has fraudulently induced the actor to submit, not because of any lack of consent to the contact, but because of the fraudulent, and therefore tortius, means by which the assent has been procured, with knowledge that the contact will or may prove harmful."

[85] Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920).

[86] PROSSER, TORTS, §86 (2d ed. 1955).

[87] Graham v. Watts, 238 Ky. 96, 36 S.W. 2d 859 (1931); Flaherty v. Till, 119 Minn. 191, 137 N.W. 815 (1912).

[88] 4 Vernier, American Family Law 268 (1936).

[89] *Supra*, note 65.

> promise of marriage, and she cannot circumvent the statute by bringing an action in tort for damages so long as the direct or underlying cause of her injury is the breach of promise of marriage.[90]

Thibault v. Lalumiere has been limited on this point by *De Cicco v. Barker*.[91]

> It was said in the *Thibault* opinion that §47A 'abolished any right of action, whatever its form, that was based' . . . upon breach of promise. Further consideration leads us to think that the statement was too inclusive and that a proceeding may be maintained which although occasioned by breach of contract to marry, and in a sense based upon the breach, is not as was the action in the *Thibault* case brought to recover for the breach itself.

New York's statute, which has been construed to abolish any action involving a broken promise of marriage, probably would not allow recovery in this instance. California, which has allowed recovery for damages caused by a fraudulent promise of marriage,[92] would probably allow recovery for seduction as an element of damage in the deceit action, and might allow recovery for a fraudulently induced seduction alone.

Where fraud can be proven it does not do violence to the letter of the Wisconsin Heart Balm act to allow recovery for seduction. Such an action is based on the fraudulent intent at the time the promise is made, not on the breach of the promise.[93] The breach is merely circumstantial evidence that defendant never intended to perform his promise. If the fraudulent intent cannot be inferred from the breach, the breach of promise has no legal significance. It is conceivable that such fraudulent intent could be proven, even if the promise was not breached.[94]

Allowing recovery for seduction will not offend the policy of Chapter 248. These actions would be successful only in limited circumstances. Fraud must be proven by clear, satisfactory evidence.[95] It must be proven that defendant made the promise for the purpose of inducing plaintiff's consent to the illicit sexual relations,[96] and that plaintiff relied on the promise when she gave her consent.[97] A plaintiff

[90] 60 N.E. 2d 349, 350-351 (1945).
[91] *Supra*, note 66.
[92] Langley v. Schumacher, 46 Cal. 2d 601, 297 P. 2d 977 (1956).
[93] *Supra*, note 51.
[94] For example, if defendant knew he could not perform his promise at the time he made it because he was presently married, fraud could be established even though the defendant had not yet breached his promise.
[95] Estate of Hatten, 233 Wis. 199, 288 N.W. 278 (1940).
[96] PROSSER, TORTS, §88, (2d ed. 1955). For the misrepresentation to be actionable, the person making it must intend, ". . . that it shall be acted upon in a certain way."
[97] *Id.* §89.

would be cautious in attempting a frivolous suit in the face of such a great evidentiary burden. If she acted without probable cause she could subject herself to a suit for abuse of process, and perhaps malicious prosecution.[98] Such suits would lend themselves to extortion no more than any action based on morally reprehensible conduct. Allowing these actions will not encourage unfortunate marriages. In such cases, marriage was never intended, at least by the defendant. If plaintiff cannot establish this, the cause fails. Although here the equities are not as clearly in favor of the plaintiff as they are in gift cases, where plaintiff is not in *pari delicto,* allowing these actions would tend to discourage fraud, and perhaps decrease the number of maidens led astray by malevolent suitors.

C. Recovery for Economic Injury Caused by A Misrepresented Intent to Marry.

Jurisdictions are divided on whether the Heart Balm acts abolish recovery in deceit for economic damages caused by a fraudulent promise of marriage. Few courts have ruled on this question.

New York, in *Sulkowski v. Szewczyk*[99] denied recovery. In that case, defendant represented to plaintiff that he was unmarried and eligible to marry her. In reality, defendant was a married man. Plaintiff brought action to recover her damages resulting from this false representation, but the court held that the suit was an attempt to circumvent the Heart Balm act.

> If plaintiff's contention be correct, then any action based upon a breach of promise to marry could be turned into an action for misrepresentations by merely alleging that the promise of marriage was a sham, made solely for the purpose of taking advantage of plaintiff. . . .
>
> It follows that Article 2-a was intended to prohibit the maintenance of such actions as the one under consideration. . . . It is the purpose of the statute to abolish actions 'based' upon a breach of contract to marry. Certainly if there has not been a promise of marriage by the defendant and a failure to keep such promise, there is not any basis for this action.[100]

Subsequently, a United States District Court, in Pennsylvania, applying both New York and Pennsylvania law, reached a similar decision, based on the *Sulkowski* case.[101]

This position has had unfortunate results. In *Easley v. Neal,*[102]

[98] Myhre v. Hessey, 242 Wis. 638, 9 N.W. 2d 106, 150 A.L.R. 889; Novick v. Becker, 4 Wis. 2d 432, 90 N.W. 2d 620 (1958). Injury to reputation might by sufficient special damage to maintain a suit for malicious prosecution in Wisconsin.

[99] 255 App. Div. 103, 6 N.Y.S. 2d 97 (1938).

[100] 6 N.Y.S. 2d 97, 98-99.

[101] A. B. v. C. D., 36 F. Supp. 85 (E.D. Pa. 1940).

[102] 110 N.Y.S. 2d 191 (S. Ct. 1952).

plaintiff, father of the bride, was induced to expend money to prepare for his daughter's marriage, in reliance on defendant's represented intent to marry her. Defendant, however, was already married. Plaintiff's claim was denied. It is doubtful that the New York Legislature intended to subject honest men to the machinations of scoundrels, and such a result is hardly required to effectuate the policy of Heart Balm acts.

The opposite view is held by California, and possibly Massachusetts. In *Langley v .Schumacher*[103] the California court allowed a plaintiff to recover damages caused by a fraudulent promise of marriage. There, defendant induced plaintiff to marry him upon his false representation that he intended to assume normal marital obligations. Defendant never intended to consummate the marriage, which plaintiff did not discover until after the ceremony. Plaintiff obtained an annulment of the marriage for fraud, and brought an action to recover for her damages. Although the factual situation in this case differs slightly from the normal breach of promise suit, in that defendant went through the ceremony, the court disregarded this difference, and faced the issue of whether the action was barred by the California Heart Balm act.

> The language of the code section [abolishing breach of promise actions] indicates that it was only intended to abolish causes of action based on an alleged breach of contract. The plaintiff's complaint states a cause of action for fraud—the making of promises without any intention of performing them. . . . Such a cause of action is not barred by section 43.5, subdivision (d).[104]

Plaintiff sought $15,000 for her actual financial detriment, and $10,000 punitive damages, for her humiliation, public disgrace, and mental anguish.

In *De Cicco v. Barker*,[105] the Massachusetts court used language (quoted *supra*) indicating that it may allow recovery in such actions, as long as recovery is not sought for the breach itself. Since, as previously mentioned, the breach of the engagement promise is no more than some evidence of fraud, actions to recover in deceit are not to recover for the breach of such promises, and Massachusetts conceivably could allow recovery.

It is apparent that the Legislative Council, which drafted Bill 151A, the Wisconsin Family Code, intended not to abolish these actions for deceit.

> An action for deceit may be brought where there has been intentional misrepresentation resulting in monetary loss.[106]

[103] *Supra*, note 92.
[104] 297 P. 2d 977, 979 (1956).
[105] *Supra*, note 66.
[106] *Supra*, note 74.

Although this comment was written with reference to 248.06, the statute which provides for recovery of property obtained by fraud, it is obviously inapplicable to that statute. 248.06 provides for recovery of property ,received by the defrauding party. The action for deceit gives relief in damages.[107] Recovery of the property could be had by replevin or restitution, but not by deceit. That the defendant received the property is immaterial to an action for deceit. Recovery may be had, even though defendant realized no benefit from his fraud.[108] Thus the intent of the legislature, as expressly stated in the original bill, would seem to allow an action for deceit for monetary loss caused by a fraudulent promise of marriage.

The action for deceit does not violate the purpose of the Heart Balm act. Here the court is not dealing with an innocent suitor who feels he is contemplating an unfortunate marriage, but a person who intentionally lied to the plaintiff with the purpose in mind of inducing him or her to be financially detrimented. Fear of extortion should not allow a wrongdoer to freely perform his pranks.

There are two measures of damages used in granting recovery for deceit. The tort, or "out-of-pocket" measure[109] allows plaintiff to recover his actual financial loss, such as expenses in preparing for the wedding, a favorable economic situation lost, or losses from benefits conferred on the prospective spouse. This measure is used when the representation did not induce making a contract. The second measure is the contract, or "benefit-of-the-bargain" measure[110] used when the misrepresentation induced a contract. Here plaintiff recovers the benefit of the promised performance, as well as actual losses. In addition to the normal measure of damages, plaintiff can ordinarily recover consequential damages proximately caused by the misrepresentation[111] such as damages for seduction, or bruised feelings. The Legislative Council probably did not intend to limit recovery in Wisconsin to the normal, monetary measure of damages. Although deceit is ordinarily brought to recover financial losses,[112] once this loss is established, consequential losses, even though non-economic, are generally compensated. The clause of the council report "resulting in monetary loss" affirms the generally held principal that before consequential damages are recoverable, there must first be a monetary loss. These words do not convey the impression that consequential damages are to be barred.

A third party who incurred damages as a result of the misrepresented intent can ordinarily recover if he can show his reliance and

[107] PROSSER, TORTS, §86 (2d ed. 1955).
[108] *Id.* §88.
[109] *Id.* §91.
[110] Anderson v. Tri-State Home Improvement Co., 268 Wis. 455, 67 N.W. 2d 853, 68 N.W. 2d 705 (1955).
[111] PROSSER, TORTS, §91 (2d ed. 1955).
[112] *Supra,* note 86.

conduct were intended by the defendant.[113] The above quoted comment of the Legislative Council does not limit the person entitled to sue for deceit to the engaged party. Thus a parent could recover for money given defendant pursuant to a fraudulent promise of marriage, or for expenses incurred in preparing for the wedding.

The action for deceit is not necessarily an attempted evasion of the breach of promise statute. Our court might hesitate in allowing damages for the lost financial benefit of the marriage, but such recovery could be avoided by using the tort measure of damages for out of pocket expenses, and consequential injuries. Consequential damages for mere sentimental bruises resulting from the fraud, by way of heart balm, might justifiably seem obnoxious to our court, but in justice, this should not prevent recovery for actual financial losses and consequential personal injuries, indignities, or physical illness from emotional distress of the jilted and defrauded suitor.

D. Recovery for Emotional Distress Resulting from a Breach of Promise.

A plaintiff should recover for severe emotional distress caused by a flagrant breach of the engagement promise. Recent cases have allowed recovery for outrageous conduct intentionally causing severe emotional distress, not merely as an element of damages, but as an independent tort.[114] The mental anguish must be extreme;[115] mere injured feelings are not compensated. Not every breach is actionable. Defendant's conduct must be outrageous,[116] and intended to affect plaintiff, or the effect must be substantially certain to follow.[117] Thus a defendant who entered the engagement as a practical joke, or leaves his bride at the altar under extreme circumstances, or abusively breaks the engagement, knowing his fiancee is peculiarly susceptible to emotional distress[118] would be liable for her extreme mental reactions, and any resulting physical illness.

Wisconsin allows recovery for intentionally caused emotional distress only if there is a resulting physical illness.[119] Our court has not faced this question recently, however, and it is likely, in view of the recent developments in this law, that it would allow recovery for a severe disturbance intentionally inflicted without resulting personal injury.[120]

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[113] Prosser, Torts, §88 (2d ed. 1955).

[114] Restatement, Torts, 2d, Tentative Draft, §46 (1957). "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it."

[115] *Id.* comment j.

[116] *Id.* comment d.

[117] *Id.* comment i.

[118] *Id.* comment f.

[119] Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900).

[120] Savage v. Boies, 77 Ariz. 355, 272 P. 2d 349 (1954); Wilson v. Wilkins, 181 Ark. 137, 25 S.W. 2d 428 (1930).

Such recoveries should not be barred by the breach of promise statute. Recovery here is not contractual, but is based on duties imposed by the law to protect the interest of mental tranquility. A defendant would not be liable for a circumspect breach of the engagement promise. He should be liable for his outrageous conduct.

E. SATISFACTION OF THE CONSTITUTIONAL REQUIREMENT OF SUBSTANTIAL REMEDY.

Chapter 248 does not effect the recovery of engagement gifts. Although this chapter prevents plaintiff from recovering for her own seduction as an element of damages in a breach of promise action, she can recover if her consent was obtained by a fraudulent promise of marriage. Economic losses, and consequential injuries incurred as a result of defendant's fraudulent marriage promise are recoverable. Plaintiff can also recover for severe emotional distress if the promise is breached under outrageous circumstances.

Although chapter 248 materially affects remedies formally available to a jilted suitor, it does not substantially impair them. Plaintiff is denied recovery for the prospective value of the marriage, and for slight emotional bruises. The injured party is denied recovery for personal indignities and economic losses when defendant's marriage promise was not fraudulent. The law leaves the parties where it finds them if the equities between them are equal. But it allows substantial remedies if extreme injustice would otherwise result.

Therefore, the abolition of the common law action for breach of promise, though limiting the right of recovery, still leaves important rights available in the areas of gifts, seduction, financial losses, and severe emotional disturbances. It appears that these rights, when considered in total, leave substantial remedies available to injured parties and satisfy the requirements of the Wisconsin Constitution.

III. CONSTITUTIONALITY OF THE PENALTY PROVISIONS

In abolishing breach of promise actions, the legislature made it unlawful for any party or attorney to commence or threaten to commence an action for breach of promise, and provided a penalty of not less than $100 nor more than $1,000, or imprisonment of not more than one year, or both.[121] The validity of this type of provision has been upheld by most states, but without a statement of reasons justifying this conclusion.[122]

It is a fundamental principle of constitutional law that the constitutional validity of a legislative act can only be determined by the judicial branch. Therefore, *Pennington v. Stewart* declared the penal provision of the Indiana Heart Balm act unconstitutional as it curtailed

[121] Chap. 595, Laws of 1959, §248.03, .07.
[122] Bunten v. Bunten, *supra*, note 15.

the right to resort to the courts to test the validity of a legislative enactment.

> Any person whose rights are prejudiced by the operation of a statute may raise the question as to its constitutionality. . . . Prior to the enactment of the act in question it was undoubtedly the law in this state that one had the right to file an action in any court of competent jurisdiction for alienation of affections. The right was abolished by the act, and certainly the appellant has the right to test its validity.
>
> The practical effect of section 8 of the act under consideration is to deny and prohibit one from contesting the constitutionality of the act. If this is a lawful exercise of legislative power, then the constitutionality of all acts of the Legislature could be prevented from being tested by a similar penalty provision being enacted in such act. The Legislature cannot enact a law and at the same time pass upon its constitutionality. It is for the courts to pass on this question.[123]

This fundamental principle has been expressed by the Wisconsin Supreme Court in *Bonnett v. Vallies:*

> There is another general feature of the act which arrests our attention and that is the penal clause, particularly in view of the recent decision of the federal supreme court, that where a police regulation is sought to be made effective by danger of such punishment for violations thereof and such burdens upon unsuccessful efforts even to test its validity as to intimidate parties affected thereby from resorting to the courts in the matter, as to practically prohibit them from seeking any judicial remedy for supposed wrongs inflicted upon them, it denies to them equal protection of the laws and renders the whole act void irrespective of whether its provisions would otherwise be valid.[124]

The United States Supreme Court decision referred to by the Wisconsin Court was *Ex parte Young.*[125] It declared that a penal provision is valid only in cases where "the jurisdiction of the legislature is complete in any event."[126] It has been the purpose of this article to indicate that when a common law remedy has been entirely abolished, the jurisdiction of the legislature is not "complete in any event." On the contrary, it is imperative that the courts determine that a substantial remedy is left to injured parties. This was stated in *Von Baumbach v. Bade:*

> The legislature having power within the limits above stated, to control, at their pleasure, the remedy, are, in the first instance, to determine for themselves whether any change or modification of remedy is necessary, and if so, what change, and whether parties to contracts are left with a substantial remedy according

[123] *Supra,* Note 19, at 623.
[124] 136 Wis. 193, 209-210, 116 N.W. 885, 890 (1908).
[125] 209 U.S. 123 (1907).
[126] *Id.* at 148.

> to the laws as they existed before such change, *subject to a revision in the last particular by the courts.*[127] [Emphasis added].

Until the limits of these substantial remedies previously discussed in this article are clearly defined by the Wisconsin Supreme Court, there also remains the great possibility of innocent violations of chapter 248. For example, an attorney may commence an action for severe emotional distress, justly believing that his particular case was unaffected by chapter 248, only to discover that it was encompassed within its scope, leaving the attorney subject to the penalty provision. If this were true, the effect would be to cast a shadow over this entire area of legal rights, supported by the fear of liability under the penalty clause for the mere threat to file an action. In this respect, *Bonnett v. Vallies* declared:

> The effect of it would be to take property without due process of law, to violate sec. 9, art. I, of the state constitution guaranteeing to every person a certain remedy in the law for all injuries or wrongs which he may receive in his person, property, or character, and to violate every principle of civil liberty entrenched in the constitution.[128]

Consequently, it is extremely doubtful whether this penalty section of chapter 248 is constitutional or whether it is "especially obnoxious because it attempts to bar resort to the courts to test the constitutionality of the Act."[129] It appears to be the latter, particularly in view of the well established principle of legal construction that statutes in derogation of the common law are to be strictly construed.[130]

If the penalty provision is unconstitutional, does it necessarily follow that the entire chapter is unconstitutional? *Pennington v. Stewart* declared that it did not.[131] The reason for this conclusion was that the Indiana act expressly provided that each section of the act was to be separately construed. Since the penalty sections were not interwoven into the entire act, only the penalty sections were held invalid. *Bonnett v. Vallies* can be distinguished since there the Wisconsin Court found the penal provision 'pervaded and condemned' the entire act, indicating that only the penal clause would have been condemned had it been otherwise.[132]

In chapter 248, it expressly provides that the entire chapter is to be liberally construed to effectuate its purpose.[133] Its purpose is to abolish breach of promise actions. This cannot be said to be dependent solely upon the penalty provision, for if the remaining sections of chapter 248

[127] *Supra,* note 35, at 579.
[128] *Supra,* note 124, at 212, 116 N.W. at 891.
[129] Wilder v. Reno, *supra,* note 3, at 728.
[130] *Supra,* note 69.
[131] *Supra,* note 19.
[132] *Supra,* note 124, at 212, 116 N.W. at 891.
[133] *Supra,* note 73.

are upheld, the traditional rules of pleading will provide the chapter with the means to accomplish this purpose. Therefore, if the construction provision is followed, like it was in *Pennington v. Stewart,* the remaining sections of chapter 248 would be constitutional.

CONCLUSION

The abolition of breach of promise is an impairment of contract obligations, prohibited by both state and federal constitutions, unless it can be justified as an exercise of the police power for the public welfare. Chapter 248 is legislation enacted for the public welfare to prevent actions which encourage unstable marriages and conduct bordering on extortion. But Article I, Section 9, of the Wisconsin Constitution, guaranteeing a remedy for wrongs to person or property, is a limitation on the scope of police power, requiring a substantial remedy to be left for previously recognized wrongs at common law. When breach of promise actions were abolished, a common law action was abrogated, and it is necessary that an adequate substitute remains to meet this constitutional requirement. It appears that substantial remedies still remain. Actions to recover for engagement gifts, and damages for severe emotional distress can still be brought. If plaintiff can prove a fraudulent promise of marriage, recovery may be had for seduction and for economic losses.

The penalty clause of chapter 248, however, appears to violate the fundamental principle that when legislation is enacted which takes away a legal right, injured parties have the right to test its constitutionality in the courts. The penalty provision is a curtailment of that basic right, and so discourages contesting the validity and the scope of chapter 248 that its constitutionality is greatly doubted. This does not mean that the entire chapter must be condemned, but rather, by liberally construing this act, the penalty provision is severable from the remaining sections. In this manner, the legislative object—the abolition of breach of promise for the protection of the general public could be accomplished, and chapter 248 could then be upheld as a new step in Wisconsin toward preserving the sancity of the marriage institution.

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